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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 15

CLARENCE J. DeBACKER, APPELLANT,

V.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

RICHARD L. KUHLMAN
County Attorney of
Dodge County, Nebraska
and
MELVIN KENT KAMMERLOHR
Assistant Attorney General
State of Nebraska
Attorneys for Appellee

JOE CHRISTENSEN, INC., 1321 O Street, Lincoln, Nebraska

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 662

CLARENCE J. DeBACKER, APPELLANT,

V.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska, APPELLEE.

MOTION TO DISMISS

Appellee respectfully moves the Court to dismiss this appeal from the Supreme Court of the State of Nebraska for the reason that it does not present a substantial federal question.

HOMER BRAINARD, Sheriff of
Dodge County, Nebraska
APPELLEE.

By RICHARD L. KUHLMAN
County Attorney of
Dodge County, Nebraska,
Fremont, Nebraska 68025
and
MELVIN KENT KAMMERLOHR
Assistant Attorney General
State of Nebraska
Room 2119 State Capitol
Lincoln, Nebraska 68509
Attorneys for Appellee

BRIEF IN SUPPORT OF MOTION TO DISMISS

The juvenile system of jurisprudence is set up as a civil court, with the State in its role of *parens patriae*, attempting to work out a solution to the problems of a child, strictly through rehabilitation. The role of the State in criminal matters also has, retribution, punishment, and deterrence as purposes in meting out sentences.

This Court, in *Re Gault*, 387 U. S. 1, quoted the following from *Kent* v. *United States*, 383 U. S. 541, with approval:

> "* * * * *
>
> "* * * 'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a *criminal trial or even of the usual administrative hearing;* but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' * * *
>
> "* * * * *" (Emphasis supplied.)

This Court in the *Gault* case, after quoting the above from the *Kent* case, had this to say in regard thereto at 387 U.S. 30:

> "* * * * *
>
> "* * * We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.
>
> "* * * * *"

The Supreme Court of Pennsylvania in *Commonwealth* v. *Johnson*, 211 Pa. Super. 62, 234 A. 2d 9, the Supreme Court of Maine in *Shone* v. *State*, 237 A. 2d 412, and the Supreme Court of Ohio in *In Re. Agler*, 240

N. E. 2d 874, have held juveniles not to be entitled to jury trials in juvenile proceedings.

The Supreme Court of Nebraska in the instant case, speaking through Judge Carter said:

"* * * * *

"* * *. In requiring a jury trial when demanded, if there is evidence that some criminal act may be involved, the real purpose of the Juvenile Court Act is destroyed. It tosses the juvenile into a trial by jury where he is tried for all intents and purposes as a criminal when this is one of the things the Juvenile Court Act purports to eliminate. Instead of hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, broadcasts to the world the evidence of a crime with which he has never been charged, and reinstates the evils of trying young juveniles on the same basis as adult criminals.

"* * * * *"

The measure of proof in a juvenile proceedings is the same measure as in a civil proceedings.

In *Re Gault, supra*, this Court pointed out:

"* * * * *

"The recommendations in the Children's Bureau's 'Standards for Juvenile and Family Courts' are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under *rules applicable to civil cases* should be admitted in evidence. The New York Family Court Act contains a similar provision.

"* * * * *" (Emphasis supplied.)

The Journal of The American Judicature Society, page 53, emphasizes that the juvenile court system did not just spring out of nowhere but was the culmination of a long history of various types of treatment of offenders. Judge Fort points out the general field of corrections over the hundred years previous to the juvenile court concept and the changes which were taking place from the death penalty for minor offenses in England, banishment to penal colonies, through prisons with two-by-four cells, through the first concept of parole adopted in Massachusetts in 1887. He emphasizes that it was against this background that Dean Pound referred to the juvenile court concept as the most important development in the science of criminal law since the Magna Carta. After then pointing out the criticism by the United States Supreme Court of the doctrine of "*parens patriae*" upon which the juvenile court concept is based, Judge Fort emphasizes that this doctrine should not be abandoned and to do so would be unnecessary and unwise. He then states:

"* * * * *

"* * *. To do so would not only be the clearest violation of the principle of stare decisis but would require the adoption of an entirely new legal theory upon which to support the juvenile court—with all of the problems which this would entail.

"* * * * *"

He then points out that *Gault* and *Kent* decisions, *supra*, by their very emphasis as to the differences between juvenile and adult courts (discussed earlier) would not result in the curtailment of the juvenile court but that working with both the doctrine of *parens patriae* and these decisions the rights of the State and of the child to fair treatment and the essentials of due

process could nevertheless be maintained. The Judge then predicted:

"* * * * *

"*Gault* then is not adversity for the juvenile court. Rather it offers the clear opportunity to strengthen and develop with the framework of its basic philosophy. I have no doubt but that this will come to pass.

"* * * * *"

The prosecuting attorney, who in Nebraska is the County Attorney, is required to determine whether a juvenile complaint or a criminal complaint shall be filed. Ordered liberty requires that someone be required to make a decision at some point. There is no logical reason why someone other than the prosecutor should make it.

Respectfully submitted,

HOMER BRAINARD, Sheriff of
Dodge County, Nebraska,
APPELLEE

By RICHARD L. KUHLMAN,
County Attorney of
Dodge County,
Fremont, Nebraska 68025
and
MELVIN KENT KAMMERLOHR
Assistant Attorney General,
State of Nebraska,
Room 2119 State Capitol,
Lincoln, Nebraska 68509
Attorneys for Appellee.